

REMARKS

Applicant has carefully reviewed and considered the Office Action mailed on June 3, 2003, and the references cited therewith.

Claims 1, 6, 7, 22, 23 and 28 are amended, claims 13-21 are canceled, and claim 29 has been added; as a result, claims 1-12 and 22-29 are now pending in this application.

*§112 Rejection of the Claims*

Claims 1-5, 8, 10-12 and 22-28 as amended now in Paper No. 13 were rejected under 35 USC § 112, first paragraph, as containing new subject matter of record in the Office Action dated June 3, 2003 which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. The Examiner objected to the use of the word, "aqueous" to the first phase. Applicant has cancelled use of the word "aqueous."

Claims 1-5, 8, 10-12 and 22-28 as amended now in Paper No. 13 were rejected under 35 USC § 112, second paragraph, for indefinite recitation of record in the Office Action dated June 3, 2003, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention. The Examiner objected to the use of the word, "aqueous" to the first phase. Applicant has cancelled use of the word "aqueous."

*§103 Rejection of the Claims*

Claims 1-12 and 22-28 as amended now in Paper No. 13 were rejected under 35 USC § 103(a) as being unpatentable over Esser (U.S. 6,221,345, of record) Palinczar (U.S. 4,724,139, of record), and Kasat et al. (U.S. 5,424,070, of record) in view of Bonastre Gilabert et al. (WO 2000001875, of record) and Kropf et al. (WO 20000047177, of record) for the same reasons of record stated in the Office Action dated June 3, 2003. The Esser patent does not describe a product that includes isosteareth 20. Instead, the Esser patent describes a cream into which an antiperspirant is added. This cream is not described as having stability in multiple cycles of warming and cooling. The product of the invention is a spray or a wipable product made from two phases, one of which is a spray emulsion, in addition to an antiperspirant as is claimed. The Esser patent describes an antiperspirant that includes a moisturizing cream that "can be a solid or

semi-solid emulsion" ... or "wax-solvent based products and ointments" and does not describe a spray emulsion or a wipe. The present invention claims a formulation that does not describe a "solid or semi-solid emulsion" ... or "wax-solvent based products and ointments." This is evidenced by the formulation claimed and the consistency of the spray, which includes a formation of droplets comprising water enclosing emollients. Claim 1 and claims depending from claim 1 describe two separate phases the make up the spray emulsion. Neither Esser nor Kasat describe a spray emulsion but instead describe much "denser" products.

Combining the "moisturizing cream" of the Esser patent and the solid stick of the Kasat reference does not produce the claimed invention because the Kasat reference describes a solid stick and Esser describes a cream. There is no spray emulsion in the Kasat product. The Kasat product cannot be formulated to make a spray, wipe or roll on product, such as is claimed. The Palinczar reference also describes waxes and a stick-type antiperspirant. The formulations in these references are different from what is claimed in that they contain waxy materials that are not claimed and don't contain materials, such as the combination of elements of claims 1, 4, 6, 7, 22 and 23, that are claimed.

The claims of the present invention are not directed to sticks and do not contain waxes and other materials making a dense, solidified product. Rather, what is claimed is a spray emulsion capable of forming droplets wherein water encloses the emulsion. The Palinczar does not describe an emulsion, such as is claimed, nor is there reference to the stability claimed, for the stick. These ingredients are not the ingredients in the products of claims 1-13.

Remaining references are non-analogous art. The '47117 application describes a use of nanoparticles in chitosanes. This reference also has no description of the specific elements claimed. A chitosane formulation and a fabric softener formulation do not suggest combination with each other and do not suggest combination with a stick, a cream, and a waxy substance. Even if they could be combined, they do not describe an antiperspirant formulation of the invention. The Examiner is picking and choosing ingredients from disparate products in order to state that the present invention is obvious. However, none of the primary references cited and none of the secondary references describe the spray emulsion claimed, the product capable of withstanding cycles of heating and cooling.

The Examiner has stated, “ the physical and chemical properties of a formulation are not considered to be a limitation to a formulation or a composition since it is well settled that recitation of an inherent property of a composition or a formulation will not further limit claims drawn to a composition or a formulation.” However, the Examiner has acknowledged that the formulations relied upon do NOT have the components claimed. How then can there be any “inherency.” Applicant asserts that there is no inherency because the formulations in the art cited have different components and are not used as antiperspirants. When courts interpret claims, each element, including the preamble, is given weight, in order to understand the breadth of the claim.

The Examiner states that the standard is a consideration of the references as a whole and not one-by-one. However, the standard for combining the references is that something in the references must suggest combination. The Applicant asserts that the references do not suggest combination because the Esser patent describes a creamy, aqueous emulsion. The Kasat reference describes a solid stick. There is no emulsion in the Kasat product. The Kasat product cannot be formulated to make a spray, wipe or roll on product, such as is claimed. The Examiner is using the argument that the standard is a consideration of the references as a whole to pick and choose ingredients among a collection of disparate products. However, what the Examiner is actually doing is using the present invention as a guide in order to pick ingredients from products that do not have anything in common with each other or with the present invention. The Examiner has not provided the basis used for combining the references, other than identifying elements in the references that are in the claims. With this criteria, the Examiner could probably use dirt as a reference to cover mineral aspects of the claim.

The products of Esser and Kasat appear antithetical. What support is there that combining the references cited yields a stable product, when the products in each reference are so different? The problem is exacerbated by the newly cited references for even more disparate products.

Conclusion

Applicant respectfully submits that the claims are in condition for allowance and notification to that effect is earnestly requested. The Examiner is invited to telephone Applicant's attorney ((612) 373-6976) to facilitate prosecution of this application.

If necessary, please charge any additional fees or credit overpayment to Deposit Account No. 19-0743

Respectfully submitted,

AMIT PATEL ET AL.

By their Representatives,

SCHWEGMAN, LUNDBERG, WOESSNER & KLUTH, P.A.  
P.O. Box 2938  
Minneapolis, MN 55402  
(612) 373-6976

Date 01/20/04

By Janal M. Kalis  
Janal M. Kalis  
Reg. No. 37,650

CERTIFICATE UNDER 37 CFR 1.8: The undersigned hereby certifies that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail, in an envelope addressed to: Commissioner of Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on this 20<sup>th</sup> day of January, 2004.

Name

Dawn M. Patel

Signature

Dawn M. Patel